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No. 00-343

Supreme Court, U.S.
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In The

Supreme Court of the United States

WALTER H. ANNENBERG, as SOLE TRUSTEE of the TRUST UNDER WILL of MOSES L. ANNENBERG, WALTER H. ANNENBERG and LENORE ANNENBERG,

Petitioners,

v.

BOARD OF COMMISSIONERS OF THE COUNTY OF MONTGOMERY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

RESPONDENT INTERVENORS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether this Court should review the judgment of the Pennsylvania Supreme Court holding that an exemption to the Pennsylvania Personal Property Tax statute violated the negative Commerce Clause of the United States Constitution, severing the offending exemption, thus rendering the tax statute constitutional, and remanding the matter to the Counties of the Commonwealth of Pennsylvania with direction to provide a retrospective remedy for the past unconstitutional discrimination, prior to affording the Counties an opportunity to provide an appropriate remedy?

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COUNTER-STATEMENT OF JURISDICTION

The Petition for Writ of Certiorari was filed within thirty days of the Opinions and Judgment of the Supreme Court of Pennsylvania which were issued on June 1, 2000. Respondent Intervenors respectfully submit that this Court does not have jurisdiction to hear this matter at this time because the June 1, 2000 Opinions and Judgment of the Supreme Court of Pennsylvania is not final pursuant to 28 U.S.C. § 1257(a).

RELEVANT STATUTES

The relevant statutory provisions of the Commonwealth of Pennsylvania are 72 P.S. § 4821.1, 72 P.S. § 4844 and 72 P.S. § 4844.1. These provisions are reprinted in the Appendix.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

Petitioners' request for review should be denied because the judgment of the Supreme Court of Pennsylvania is not "final" as is required for this Court to have jurisdiction under 28 U.S.C. § 1257(a). The judgment is not final because the Supreme Court of Pennsylvania remanded the case to the Counties[1] to craft a remedy

[1] The respondent intervenors in this matter are the County Commissioners' Association of Pennsylvania, and the Boards of the County Commissioners of Adams, Chester, Dauphin, Indiana, Lackawanna, Schuylkill, Warren and York Counties. In

which would provide Petitioners with meaningful backward-looking relief consistent with *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept of Business Regulation*, 496 U.S. 18 (1990). Further, as this Court has stated, it is this Court's practice to allow the state supreme court to fashion a remedy in the first instance prior to taking up the issue of the appropriateness of that remedy for review. *Fulton v. Faulkner Corp.*, 516 U.S. 325 (1996).

Providing the necessary meaningful backward-looking relief demands a county by county examination of the new and greatly expanded base of taxable property reached by the Personal Property Tax, 72 P.S. § 4821 (Petition, App. at pp. 50-56) and, based upon that analysis and following the appropriate rule-making legislative actions by the Counties, the implementation of the chosen remedy. If no taxpayer challenges the remedy, there is no longer a case for this Court to review. Any taxpayer unhappy with his or her remedy may petition the Supreme Court of Pennsylvania so that Court can determine whether the Counties have leveled the playing field as that Court has ordered. Until that time, this matter is not ripe for review by this Court.

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this brief, the term "Counties" refers to all the counties in Pennsylvania which levied the PPT with its unconstitutional exemption.

I.

THIS COURT LACKS THE JURISDICTION TO GRANT THIS WRIT AS THE JUDGMENT RENDERED BY THE PENNSYLVANIA SUPREME COURT IS NOT FINAL.

Although this Court has jurisdiction to review, by writ of certiorari, the final judgment of the highest court of a state in which a decision could be had concerning the constitutionality of a state statute, pursuant to 28 U.S.C. § 1257(a), the judgment of the state court must be "final." In this case, the Supreme Court of Pennsylvania found that the exemption from taxation by the Pennsylvania Personal Property Tax (PPT) of the shares of stock of corporations subject to the Pennsylvania Capital Stock and Franchise Tax (*i.e.*, Pennsylvania corporations and corporations doing business in Pennsylvania) could not be justified as a compensatory tax and, therefore, was unconstitutional. The Pennsylvania Supreme Court severed the offending exemption, thereby making all shares of stock subject to the PPT, thus rendering the statute constitutional. The Supreme Court of Pennsylvania then remanded the matter to the various Pennsylvania Counties to provide an appropriate remedy. (Petition, App. at p. 31).

Prior to, and as an essential part of creating an appropriate remedy, the Counties must ascertain the scope of the new taxable base of the PPT. Through information which is currently available and readily obtainable, the Counties must determine the identity of each taxpayer who paid the PPT and how much each taxpayer paid under the formerly unconstitutional regime, whether that

taxpayer may now owe additional tax under the PPT and whether additional taxpayers, whose intangible property escaped taxation because they held stock only in Pennsylvania corporations or corporations doing business in Pennsylvania, may now be required to pay the PPT. Following this inquiry, each County must analyze the information gathered to determine which of the various alternative remedies, or which combination of such remedies, is most appropriate in that County, and after analysis, the County must implement that decision in the manner consistent with its rule-making authority.

Preliminarily, it should be noted that the Supreme Court of Pennsylvania, consistent with this Court's practice, did not limit its direction to the Counties to provide a particular remedy, but rather directed all the Counties which had implemented the PPT to provide an appropriate remedy. *See Fulton*, 516 at 347. ("Where 'the federal constitutional issues involved [in the remedial determination] may well be intertwined with, or their consideration obviated by issues of state law,' our practice is to leave the remedy for the state supreme court to fashion on remand.") (internal citations omitted.) The PPT was and is a tax authorized by state statute, but levied at the county level at the discretion of the individual County. 72 P.S. § 4821.1. (App. at p. 1). Thus, the constellation of remedies, including a refund, a credit, prospective or retroactive application of the PPT, or any combination thereof, must be determined on a *County by County* basis. Each County is in the process of fashioning the remedy appropriate to its particular situation. Following the implementation of the remedies, the Supreme Court of

Pennsylvania must determine any challenge to the adequacy of the remedies.

It should also not be overlooked that any remedy chosen by a County may provide the taxpayer with the required meaningful backward-looking relief and the present controversy may become moot. This applies with equal force to the remedy chosen by the Petitioners' home county, Montgomery County. Nevertheless, if any taxpayer, including Petitioners, feels aggrieved by the remedy chosen by a particular County, that taxpayer must apply to the Supreme Court of Pennsylvania for relief, prior to invoking this Court's jurisdiction. Only after that final step is taken, and the Supreme Court of Pennsylvania has passed upon that remedy, is this matter final. *See Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948) (state court judgment lacks finality where it compels action but offers various alternative ways to comply, some of which involve further administrative and judicial proceedings).

II.

THIS CASE IS NOT RIPE FOR REVIEW.

The Pennsylvania Supreme Court's decision announced on June 1, 2000 is not ripe for review by this Court. The Counties are still in the process of fashioning a remedy. The remedy provided by Petitioners' home county may satisfy Petitioners and moot the controversy. Any remedy crafted by a County that is challenged by taxpayers should, in the first instance, be reviewed by the Pennsylvania Supreme Court to determine whether the remedy provided is permitted by the Pennsylvania tax

regime, compatible with that Court's directives in *Annenberg v. The Commonwealth of Pennsylvania, et al.*, 2000 WL 704980, and permitted by the United States and Pennsylvania Constitutions. If a taxpayer who has brought such a challenge is dissatisfied with the ruling of the Pennsylvania Supreme Court, that taxpayer may then bring that dispute, which will be ripe for determination, to this Court for review.

Petitioners, in an effort to deny the Counties the opportunity to fashion a remedy, contend that the only meaningful backward-looking relief that the Counties can provide is a refund. Petitioners raise two separate meritless arguments for this proposition. First, Petitioners argue that the Counties do not have the authority, in a manner consistent with constitutional limitations, to retroactively impose the PPT on those taxpayers who had held stock which was previously exempt (*i.e.*, stock in Pennsylvania corporations or corporations which had done business in Pennsylvania). Second, Petitioners argue that the only possible meaningful backward-looking relief due Petitioners is a refund of taxes paid, which this Court should order. These contentions are both premature and incorrect.

The Supreme Court of Pennsylvania held that the PPT had been lawfully collected, but that the clause of the PPT which exempted from taxation stock in Pennsylvania corporations and corporations doing business in Pennsylvania was unlawful. The Supreme Court of Pennsylvania directed the Counties to level the playing field and provide those taxpayers who had paid the PPT under the unconstitutional tax regime with meaningful backward-looking relief. The Counties have begun the inquiry into

the method by which this must be accomplished. This necessary inquiry includes, *inter alia*, determining the scope of intangible property now taxable under the PPT, whether and who may now be liable for as yet uncollected taxes under the PPT, the determination of the chosen remedy, and the implementation of the remedy consistent with the authority granted to the Counties by Pennsylvania law. Until the Supreme Court of Pennsylvania has reviewed and passed upon the remedy, Petitioners' home county, Montgomery County, provides to Petitioners, their complaints are premature and do not present this Court with a concrete, justiciable controversy to adjudicate.

Petitioners' efforts to deny the Counties an opportunity to fashion an appropriate remedy focus this Court's attention on the Pennsylvania refund statute, but do not address the other mechanisms available under Pennsylvania law to provide Petitioners with the meaningful backward-looking relief they seek, *e.g.*, the right of the Counties to tax, for past years, the stock held by Pennsylvania residents which had previously escaped taxation under the now invalid exemption to the PPT.

Petitioners are wrong in their contention that any efforts by the Counties to retroactively assess the PPT would be inconsistent with Pennsylvania law. Under Pennsylvania law, the Counties may reassess the PPT return of a taxpayer which is "false, incomplete, incorrect or inaccurate," within five years after any of the property "held by a taxpayer should have been returned by him for taxation." 72 P.S. § 4844(a) and (c). (App. at pp. 1-3). The practical effect of the Supreme Court of Pennsylvania's decision below, which severed the exemption in the

PPT that had formerly saved from taxation stock held in corporations that paid the Capital Stock and Franchise Tax, is that all stock held by Pennsylvania citizens is now subject to the PPT. Thus, any resident who owned personal property which would have been subject to the PPT, but for the exemption, can be reassessed and required to pay a tax upon that property which was previously exempt. Therefore, under applicable Pennsylvania law, the Petitioners' home county, Montgomery County, may reassess Petitioners' PPT returns on the grounds that Petitioners' returns, as a result of the decision below, are now incorrect or inaccurate.[2]

Additionally, Petitioners' argument that the "transience of taxpayers make it impossible for the [Counties] to achieve substantial uniformity of taxation with respect to residents who would now be liable for personal property taxes" (Petition at p. 11) in effect places the rabbit in the hat. Whether the Counties are able to provide Petitioners with the "rough justice" they seek, by identifying and taxing those individuals who held stock which was

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[2] Petitioners claim refunds for the years 1993, 1994 and 1995. (Petition at p. 11). As stated *supra*, the Pennsylvania PPT was levied on all stocks, but exempted from taxation stocks in Pennsylvania corporations or corporations doing business in Pennsylvania. Should Montgomery County decide to retroactively assess the PPT, on previously exempt holdings, and assuming that two-thirds of Petitioners' holdings, previously exempt from taxation are now taxable, simply levying the PPT on Petitioners' holdings for the year 1996, alone, may lead to a tax liability equal to their refund claims for the years 1993, 1994 and 1995 and thus comply with the requirement that Petitioners be afforded meaningful backward-looking relief.

exempt from the PPT, is a matter which must be determined by the Counties in the first instance. The Counties' efforts at collecting any PPT taxes now need not be perfect. *McKesson*, 496 U.S. at 41 n.23 ("[A] good faith effort to administer and enforce . . . a retroactive assessment likely would constitute adequate relief, . . . "). In any event, the Counties should be given the opportunity to provide a remedy before Petitioners challenge the legitimacy of that remedy.

Pennsylvania law provides that the failure to challenge a PPT assessment within thirty (30) days of the assessment constitutes a waiver of the right to later challenge the assessment for that year. 72 P.S. § 4844.1(a). (App. at pp. 3-4). Upon receiving a PPT bill for the year 1996, Petitioners timely filed a challenge to the assessment as is required under Pennsylvania law. The tax assessment by Montgomery County for the year 1996 was held in abeyance pending the Supreme Court of Pennsylvania's decision in this matter. Neither Petitioners nor any other taxpayer timely challenged any assessment of the PPT prior to 1996. The impact that Petitioners' failure to timely challenge any PPT assessments prior to 1996 may have on the type of remedy provided by the Counties must be determined by the County's Board of Tax Assessment Appeals in the first instance. 72 P.S. § 4844.1. (App. at pp. 3-4). If the taxpayer feels aggrieved by that Board's decision, the taxpayer may then follow the appeal process and ultimately petition the Supreme Court of Pennsylvania for relief. If the taxpayer is not satisfied with the relief he or she has received after review by the appropriate state courts, including the Supreme Court of Pennsylvania, then, and only then, does the taxpayer

have a controversy which is ripe enough to allow a petition to this Court to review the relief granted.

The state law cases cited by Petitioners, *Schmuck v. Hartman*, 222 Pa. 190, 70 A. 1091 (1908) and *In re Davis*, 349 Pa. 651, 37 A.2d 498 (1944), that appear to preclude any remedy other than a refund, are inapposite, being based upon limitations in the taxing statute which have been long since eliminated by the Pennsylvania Legislature. Specifically, the PPT statute, as it existed at the time of the *Schmuck* decision, did not allow a County to retroactively reassess the PPT after the year in which it was due. In 1927, subsequent to the *Schmuck* decision, the Pennsylvania Legislature amended the PPT statute to allow the taxing authority to reassess a taxpayer's PPT return within five years after its filing. The PPT statute was again amended in 1945 to allow for the reassessment of PPT returns which were incorrect or inaccurate, which in effect overruled the *In re Davis* decision. In 1961, the Pennsylvania Legislature reorganized the PPT statute into separate sections, including 72 P.S. § 4844, (App. at pp. 1-3), which delineates the Counties' full authority to reassess PPT returns.

Similarly, Petitioners' citation to *Commonwealth v. Budd Co.*, 379 Pa. 159, 108 A.2d 563 (1954) for the proposition that the legislature cannot retroactively tax beyond the legislative session immediately preceding the enacted change in taxation (Petition at p. 10) is inapposite. The reassessment statute, 72 P.S. § 4844, is not new legislation, to which the *Budd* rule applies, but a pre-existing means for including in the tax base that property that should have been returned for taxation, but, for whatever reason, was not.

Finally, Petitioners' argument that the Pennsylvania Supreme Court's decision allowing the Counties to choose among the universe of potential remedies (including, *inter alia*, a refund, a credit, prospective or retroactive application of the PPT, or any combination thereof) rather than order the Counties to provide refunds under the guise of a "bait and switch," is without merit. Until a remedy is adopted, Petitioners cannot claim they are aggrieved by the choice of remedy. In the end, Petitioners may be satisfied with the remedy they are afforded. Thus, since the Counties have not yet had the opportunity to craft a remedy, Petitioners' complaint of a "switch" is premature as the "bait" has not yet been chosen.

In any event, before this Court intervenes in the matter, Pennsylvania should have the opportunity to determine whether any relief provided by the Counties is consistent with Pennsylvania law and the directions provided by the Supreme Court of Pennsylvania below.

CONCLUSION

For the reasons stated herein, respondent intervenors, the County Commissioners' Association of Pennsylvania, and the Boards of the County Commissioners of Adams, Chester, Dauphin, Indiana, Lackawanna, Schuylkill, Warren and York Counties, respectfully request this Honorable Court to deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

§ 4821.1. Authority for imposition and collection of taxes

Notwithstanding any other provision of this law to the contrary, the county commissioners of each county of the second through the eighth class, and the city council in cities and counties of the first class, shall have the power to determine whether or not to impose and collect the taxes permitted under the provisions of this law.

1913, June 17, P.L. 507, No. 335, § 1.1, added 1978, April 18, P.L. 56, No. 26, § 1, imd. effective.

§ 4844. Failure to file return; false or late return; assessments; additions; time; objections

(a) If any taxable resident shall fail to file a return, or fail to include in any return all of his property made taxable by this act,[1] or shall file a return which is false, incomplete, incorrect or inaccurate, the board of revision of taxes, or the county commissioners, shall make an assessment of the tax against such resident of the amount of tax for which such resident is liable, or for which he is believed by the board of revision, or county commissioners, to be liable, to which estimated return the board of revision of taxes, or county commissioners, shall add twelve per cent, and the aggregate amount so obtained shall be the basis for taxation. If any taxable resident of a county of the second class or second class A shall file a return at a time later than the last day for filing such a return as fixed by law of the year in which he is liable to

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[1] 72 P.S. § 4844.

pay the tax imposed by this act, the board of property assessment appeals and review of such county of second class or the board of assessment appeals of such county of the second class A shall add five per cent to the assessment of the tax, and the aggregate amount so obtained shall be the basis for assessment.

(b) The board of revision, or the proper county commissioners, shall notify by mail such resident of the estimated assessment. If such resident is dissatisfied with the assessment so made, he may, on or before the day fixed for appeals from assessments, present reasons, supported by oath or affirmation, for his failure to file a return to include all of his taxable property therein; or for having made a return which was incomplete, incorrect or inaccurate, and the board of revision of taxes, or the county commissioners, as the case may be, may, if satisfied with the excuse so presented, permit the taxpayer to file his own return and substitute said return for the estimated return made by the board of revision of taxes or the county commissioners. In all cases where a false return has been filed by the taxpayer, the board of revision of taxes or the county commissioners, may not relieve the taxpayer from the payment of the twelve per cent penalty, but the estimated return shall be final, except in those cases in which a true and correct return shall reveal a higher assessed value than that contained in the estimated return, in which case the tax and penalty shall be based upon the true valuation.

(c) An assessment, as herein provided, may be made by the board of revision of taxes, or the county commissioners, at any time within five years after any property owned, held or possessed, or alleged to have

been so owned, held or possessed, by any resident should have been returned by him for taxation, notwithstanding he shall have paid a tax assessed on the basis of returns previously made or filed, and notwithstanding the board of revision of taxes, or the county commissioners, shall have made previous assessments against such resident. In any such case no credit shall be given for any penalty formerly assessed and paid.

1913, June 17, P.L. 507, § 5. Amended 1923, May 31, P.L. 474, No. 260, § 1; 1927, May 13, P.L. 985, No. 476, § 1; 1931, June 12, P.L. 544, § 1; 1945, May 18, P.L. 703, § 1; 1947, July 3, P.L. 1249, § 2; 1961, Sept. 2, P.L. 1230, § 1; 1990, May 4, P.L. 162, No. 37, § 1, imd. effective.

§ 4844.1. Reassessment, petition for; appeal

(a) Any resident, against whom an assessment is made, may petition the board of revision of taxes, or the county commissioners, for a reassessment. Notice of an intention to file such a petition, or to appear and be heard, shall be given to the board of revision of taxes, or the county commissioners, within thirty (30) days after notice of such assessment is given or sent by the board of revision of taxes, or the county commissioners, to the taxpayers, as provided in this act.[1] The board of revision of taxes, or the county commissioners, shall hold such hearings, as may be necessary, to hear and determine petitions for reassessment, at such places and at such times as may be determined by the rules and regulations

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[1] 72 P.S. § 4821 et seq.

of the board of revision of taxes, or the county commissioners, and each petitioner who has duly notified the board of revision, or the county commissioners, of an intention to file a petition for reassessment, or to appear and be heard, shall be notified by the board of revision of taxes, or the county commissioners, of the time when and the place where such hearings shall be held. All such petitions shall set forth specifically and in detail the ground, upon which it is claimed, the assessment is erroneous or unlawful, and shall be accompanied by an affidavit, under oath or affirmation, certifying to the correctness of the facts stated therein. If no petition for reassessment is filed with the board of revision of taxes, or the county commissioners, the petitioner may, in lieu thereof, appear at the hearing and present his petition orally, in which event all testimony or statements of facts shall be made under oath or affirmation.

(b) If such petitioner is dissatisfied with the action of the board of revision of taxes, or the county commissioners, on his petition for reassessment, he shall have the right to appeal to the court of common pleas of the county where he resides at any time within sixty (60) days after notice of such action is given to him by the board of revision of taxes, or the county commissioners. If any resident shall fail to give due notice of an intention to petition for reassessment, or to appear and be heard after due notice of his intention to do so, or to appeal to the court of common pleas within the time and in the manner herein set forth, the right to do so shall be forever barred, and any such resident, so failing, shall not thereafter be permitted in a suit for the recovery of such tax to set up any ground of defense which might have been

determined, either by the board of revision of taxes, or county commissioners, or the court of common pleas as aforesaid. In all cases of petitions for reassessment and appeals, the burden of proof shall be on the petitioner or appellant, as the case may be, and every appeal to the court of common pleas under this section shall specify all the objections to the assessment, and any objection not specified in the appeal shall not be considered by the court: Provided, That in counties of the second class where the amount of taxes for one year which may be levied on such assessment does not exceed the sum of twenty-five hundred dollars ($2500), such appeal shall be taken to the County Court of Allegheny County, and it shall be the duty of said court to hear and determine said appeal and, if necessary, to make such changes in the assessment as may be right and proper.

1913, June 17, P.L. 507, § 5.1, added 1947, July 3, P.L. 1249, § 3. Amended 1955, Dec. 13, P.L. 836, No. 243, § 1.